

March 10, 2009

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUITElisabeth A. Shumaker
Clerk of Court

In re:

CLAUDIA (CLAUDE) E. BURTON,
III,

Movant.

No. 09-1060

ORDER

Before **BRISCOE**, **HARTZ**, and **HOLMES**, Circuit Judges.

Movant Claudia Burton seeks authorization to file a second or successive habeas petition challenging her 2003 Colorado conviction for sexual assault on a child. After numerous state court proceedings, Ms. Burton filed a petition under 28 U.S.C. § 2254 in federal court in October 2008 raising a claim of ineffective assistance of counsel relating to her guilty plea and a Fifth Amendment claim relating to her participation in Colorado's Sex Offender Treatment Program.

The district court concluded that Ms. Burton's ineffective assistance claim was procedurally defaulted in the state court and that she failed to exhaust her Fifth Amendment claim, but if she were to do so now, it would be procedurally barred. Accordingly, the district court dismissed Ms. Burton's §2254 petition on January 7, 2009, on the ground that both her claims were procedurally barred.

Within ten days of the dismissal, Ms. Burton filed a motion objecting to the district court's ruling, which the court construed as a motion under Fed. R. Civ. P. 59(e). In the motion, Ms. Burton challenged the district court's procedural default determination on several grounds. In addition, she noted that one of her state court filings had been adjudicated on the merits and she had appealed the decision to both the Colorado Court of Appeals and the Colorado Supreme Court, so the claims raised in that filing were fully exhausted and were not procedurally barred. She therefore sought to add those claims¹ to her federal habeas petition. In denying Ms. Burton's Rule 59(e) motion, the district court stated that to the extent Ms. Burton sought to raise new federal habeas claims, those claims would be second or successive and she would have to obtain authorization from this court to raise them.

Ms. Burton now seeks authorization from this court under 28 U.S.C. § 2244(b)(3)(A) to file a second habeas petition. We may not grant authorization unless Ms. Burton makes a prima facie showing that she meets the requirements of § 2244(b). 28 U.S.C. § 2244(b)(3)(C). Accordingly, Ms. Burton must show that her claims have not been presented in a prior application and that they rely on "either a new and retroactive rule of constitutional law or new facts showing a

¹ In that June 2004 petition to void an illegal sentence, Ms. Burton raised due process, equal protection and *Blakely* claims.

high probability of actual innocence.” *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005); *see also* 28 U.S.C. § 2244(b)(1), (2).

The first claim for which Ms. Burton seeks authorization is the same claim of ineffective assistance that she raised in her first habeas petition. She contends that the district court erred in holding the claim was procedurally barred, and she therefore seeks to raise the claim again in a second petition. Because Ms. Burton has raised this claim in an earlier application, we cannot grant authorization for her to raise it again. *See* 28 U.S.C. § 2244(b)(1). Her arguments about the propriety of the district court’s ruling are more appropriately raised in her appeal of that decision than in the present motion for authorization.

Ms. Burton also seeks authorization to raise Fifth Amendment and due process claims concerning her participation in the Sex Offender Treatment Program. Some aspects of these claims are identical to the Fifth Amendment claim she raised in her first habeas petition. Specifically, she previously raised the claim that the program violates the Fifth Amendment because it requires her to admit uncharged past conduct that may incriminate either herself or other family members. We therefore deny authorization for this claim.

Ms. Burton also seeks to raise a new claim that the Sex Offender Treatment Program violates the Fifth Amendment because it requires her to admit to the conduct underlying her conviction regardless of the fact that she is innocent of the charged conduct. She also seeks to assert a new claim that the terms of the

program and her termination from the program violated her due process rights. These new claims do not rely on either new and retroactive constitutional law that was not available when Ms. Burton filed her first federal habeas petition or new facts that were not previously available that would likely establish her innocence. We therefore deny authorization for these claims.

Finally, Ms. Burton seeks authorization to raise a new claim of actual innocence. She contends that she was coerced into pleading guilty by the prosecutor's threat that if she went to trial she would get a much longer sentence than if she pleaded guilty, and that she was not actually guilty. She claims to have new evidence of her actual innocence, which she describes as a confrontation between her and the victim (her daughter) in 2001 in which the victim called Ms. Burton names and threatened to get revenge against her if Ms. Burton enforced certain rules of conduct that the victim did not like. This alleged evidence of Ms. Burton's innocence is not new evidence that could not have been discovered previously. Rather, the incident she recounts occurred before she was even arrested on the charge of conviction. Because this claim relies on neither a new rule of constitutional law nor new evidence, her request for authorization on this claim also is denied.

Ms. Burton's motion for authorization is DENIED in its entirety. The denial of authorization is not appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari. *See* 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal flourish.

ELISABETH A. SHUMAKER, Clerk